CASE No. CV06PO0007

[2010] EWHC B2 (Fam)

IN THE HIGH COURT OF JUSTICE

FAMILY DIVISION

COVENTRY DISTRICT REGISTRY

Before:

HIS HONOUR JUDGE BELLAMY

SITTING AS A DEPUTY JUDGE OF THE HIGH COURT

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BETWEEN:

TE

Applicant

and

SH

First Respondent

and

S

(by his guardian ad litem, Ms J)

Second Respondent

CASE No.: NU10C00043

AND BETWEEN:

A LOCAL AUTHORITY

Applicant

and

TE

First Respondent

and

SH

Second Respondent

and

S

(by his Children's Guardian, Ms J)

Third Respondent

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Miss Alison Ball QC and Mr Oliver Peirson for the father

Miss Lorna Meyer QC for the mother

Mr John Vater for the local authority

Miss June Rodgers for the child

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JUDGMENT

1. These proceedings concern, S. S is now almost 12 years old (born 5th March 1998). S's parents are TE ('the mother') and SH ('the father'). On 21st December 2009 I heard an application by the father for a residence order in respect of S. I handed down a reserved written judgment on 4th January 2010 – Re S (A Child) [2010] EWHC 192 (Fam). I concluded that it was in the best interests of S's welfare for him to move to live with his father. I directed that the transfer of care should take place on 7th January. The mother and NYAS, then S's guardian ad litem, asked for permission to appeal. I refused those applications.
2. On Tuesday 5th January, the mother applied to the Court of Appeal for a stay of my order until such time as the Court of Appeal could hear her application for permission to appeal. Her application was heard that same day by Lady Justice Smith. Her Ladyship granted a stay and directed that the application for permission to appeal be listed for hearing with the appeal to follow immediately if successful.
3. The applications by the mother and NYAS for permission to appeal were listed for hearing before the full court (Lords Justices Thorpe, Wall and Rimer) on 20th January. Their Lordships gave judgment on 21st January. The application for permission to appeal was refused. The Court of Appeal sent the case back to me to deal with the handover arrangements.

<u>History since 21st January 2010</u>

4. The case was listed for hearing before me on 26th January. Anticipating that there may be difficulties in securing the handover from mother to father, I took a number of steps in advance of that hearing. Firstly, I asked the parties to go back to Dr W, the Child and Adolescent Psychiatrist who had given expert evidence at previous hearings, to seek his advise on how my order of 4th January could best be implemented in order to minimise S's distress, and to advise on the support S is likely to need in the early days of his placement with his father. Secondly, in light of the criticisms contained in my judgment of 4th January of the NYAS caseworker, Mrs K, and of her indication that she did not consider it appropriate for her to play

any part in the transfer arrangements, I invited Cafcass to make an officer available to the court. Thirdly, I invited the local authority to make a social worker available to the court with a view to that social worker being involved in the transfer arrangements. The parties were advised that I proposed to take those steps. It was my expectation that the handover arrangements would be made at that hearing.

5. At around 6.00a.m. on the morning of 26th January the mother was taken ill with chest pains. She was admitted to hospital. Despite their best endeavours the mother's legal team was unable to obtain information about her condition. The mother's unavoidable absence meant that only limited progress could be made at that hearing. I came to the view that I needed evidence as to the mother's health before I could fix a new date for a hearing to determine the handover arrangements. I listed the matter for a short directions hearing on 28th January.
6. As I indicated in my earlier judgments, S's first rule 9.5 guardian ad litem was Ms J, an officer of Cafcass. Ms J attended the hearing on 26th January. She had had the opportunity to read my earlier judgments and a note of the judgment of the Court of Appeal. She had been able to discuss the case with senior managers. At that stage she had no status in these proceedings. I was told that Cafcass did not consider it appropriate for one of its officers to be involved in the handover arrangements.
7. The local authority has played a key role in these proceedings since 26th January. I am extremely grateful for the considerable help provided in particular by Mrs G, the local authority's Young People Legal Services Manager, and by Ms SK, Operations Manager for the relevant District Children's Team. They, too, had the opportunity to read the judgments in advance of the hearing on 26th January. Like Cafcass, their position at that stage was that they were unwilling to be involved in the handover arrangements.
8. The next hearing was on 28th January. I was told that the mother had been discharged from hospital on the afternoon of 26th January. I was also told that there was a history of cardiac problems within her family. Since the mother's health may

have been a relevant issue for the court to take into consideration in making the handover arrangements, I directed that the parties should obtain a joint report from a Consultant Cardiologist, that report to be filed by 8th February. I was told that Ms J and Ms SK intended to make a joint visit to see the mother on 1st February, depending upon the mother's health. I indicated my intention to fix a date for determination of the handover arrangements during the week beginning 8th February. I listed the case for further directions on 2nd February.

9. At the hearing on 2nd February I was persuaded that the full hearing to determine the handover arrangements may last for more than a day. I listed the matter for hearing on Tuesday 9th February with Tuesday 16th February reserved as a second day if required. It was also agreed that on 9th February the morning should be taken up by a professionals' meeting at court involving Dr W, Mrs K (the NYAS caseworker), Ms J, Ms SK and Mrs G who acted as Chair.

10. The parties jointly instructed Dr P, Consultant Cardiologist, to examine and report on the mother. Dr P's report was filed on 9th February. Dr P advised that there is no current evidence of heart abnormality of significance. He went on to say

> 'Symptoms have been intermittent over the last 18 months and whilst recent stress may be playing a role, this was not a factor at the time of preceding episodes. Alternative causes for her symptoms include gastroesohpageal reflux and innocent chest wall pain. My own current routine practice would be reassurance and an expectant approach.'

The report contained a short addendum written following a treadmill test on 8th February. The addendum reports that the mother had

> 'completed a relatively curtailed standard exercise protocol and managed only three minutes of exercise before the test was terminated due to a rapid rise in heart rate with associated shortness of breath.'

Dr P notes that a 24 hour Holter monitor had been fitted to assess the mother's hear rate during day to day activity. I have not been informed of the result of those tests,

though I note that Dr P goes on to say that

> 'The limited exercise capacity is not entirely in keeping with the clinical picture though there are no immediate concerns regarding the possibility of ischaemic heart disease. My routine practice in this situation would be to organise a further non-invasive test to exclude myocardial ischaemia – either a myocardial perfusion scan or a Dobutamine stress echocardiogram. Definitive comments cannot therefore be made but the previous conclusions within this report remain unchanged.'

11. The professionals' meeting at court on 9th February was more productive than its participants had expected. It was agreed between the professionals that there should be a phased handover from mother to father. This was to begin with overnight contact from 19th to 20th February, handover to take place at the Cafcass office in Coventry. That was to be followed by further contact, including overnight contact, up until 4th April at which point S was to move into his father's full-time care. During the intervening weeks it was agreed that S should gradually move his belongings from his mother's home to his father's home.
12. It was a condition of the order I made on 4th January that S should not be told about my order at that stage. By the date of the hearing on 9th February, S was still unaware of my order. As part of the arrangements agreed by the professionals it was proposed that the mother should tell S of my order during the weekend of 14th/15th February, the beginning of half-term week. She was to do so using a script which she had written and which had been agreed by the professionals. It was also agreed that she would hand S a letter from me, the content of which had also been agreed by the professionals. In the event that the proposed staged transfer of care from mother to father did not work it was agreed that the only alternatives would be either for the order to be enforced by means of the Tipstaff or that there should be an interim care order in favour of the local authority with a view to S spending a short period of time in foster care as a bridge between mother's home and the

transfer to father's home. It was agreed that the hearing should be adjourned for seven days to enable the detail of an order to be agreed between the parties.

13. The case came back before me on 16th February. An order was agreed reflecting the agreement reached at court on 9th February. The order contained a requirement that on the next working day after each contact session the father's solicitors should e-mail me to advise me as to whether the contact had taken place and whether any problems had been encountered. I made it plain to the parties that in the event that any contact visit did not happen I would bring the case back for an urgent directions hearing.

14. In my judgment of 4th January I was critical of the role played by the NYAS caseworker, Mrs K. Though willing to allocate an alternative caseworker the information from NYAS suggested that that could not be achieved quickly. Furthermore, a change of caseworker would have meant the introduction of another new professional into the case. At such a delicate stage, that seemed to me to be unhelpful. I therefore decided to re-appoint Ms J, the Cafcass Officer who had been guardian ad litem for S until 2007. At the hearing on 16th February I discharged the appointment of NYAS and re-appointed Ms J.

15. At the request of the other parties, whilst at court on 16th February the mother prepared and filed a written statement setting out her account of her conversation with S. As anticipated, he was very distressed when told of my order of 4th January. He felt that no-one was listening to him. The mother has filed a second statement, dated 22nd February, providing an update on S's disposition. S is still very distressed.

16. Given the history of this case it came as no surprise to me when, at lunchtime on Friday 19th February, I received a message to say that S was refusing to co-operate in the proposed weekend contact. Ms SK and Ms J took the view that the proposed contact should be abandoned. The father received that news as he was about to board a train at Euston Station. I was due to sit in London during the week of 22nd

February. I directed that the case be listed before me in London on 23rd February.

17. In light of the failure of the agreed handover plan, the local authority decided to issue care proceedings. Those proceedings were issued on 22nd February. They were immediately transferred to the County Court and from thence to the High Court. The application was supported by a detailed statement from Ms SK and an interim care plan. The interim care plan states that the local authority had managed to identify a foster placement which was culturally appropriate.

18. At the hearing on 23rd February there was no agreement between the parties about what should be the next step. The father's position was and is that the order of 4th February should now be enforced through the office of the Tipstaff. The other parties are agreed that there should be an interim care order in favour of the local authority. Given that disagreement a further hearing was inevitable. I listed the case for hearing on 1st March with a time estimate of one day with judgment to be handed down on 3rd March.

19. Concern was expressed at the hearing on 23rd February about how the Tipstaff might go about his task if it fell to him to implement my order of 4th January. In particular, concern was expressed that his normal practice would be to delegate the task to the local police. The prospect of a handover involving uniformed officers was considered by all parties to be a concern. I indicated to the parties that I proposed to have a conversation with the Tipstaff. This I subsequently did, and confirmed his position to the parties by e-mail. The Tipstaff has agreed that he personally would travel to the mother's home, accompanied by a female assistant; that the mother should be given up to 48 hours notice of the date and time of his visit; that he would not involve the local police save that he would let them know of his business in their area; that he would drive S to his father's home in the South East; and that, if it were possible, it would be helpful if Ms J were able to be present at handover and accompany S on the journey. The Tipstaff expressed concern about the possibility of the Press being informed of the handover arrangements and

photographers being present. I deal with that issue later in this judgment.

20. So it is that the matter came on for hearing before me on 1st March, the seventh time the case has been before me since the Court of Appeal gave judgment on 21st January. I heard evidence from Dr W, Ms SK and Ms J. I subsequently received written submissions from all four counsel.

Research material

21. At the hearing on 23rd February the advocates agreed a schedule of questions that should be put to Dr W concerning the handover arrangements. His responses were given by telephone. A detailed note was prepared of his responses. He referred to a number of research papers, copies of which have since been circulated. All counsel have referred to this research in their closing submissions. I make it plain that I have considered the particular passages to which counsel have referred. In addition to bearing those passages in mind, the following messages from the research papers appear to me to be of relevance.

22. All of the papers referred to come from an American journal, the Family Court Review, and appeared in the edition published in January 2010 which seems to have been an edition devoted to the subject of alienation. It is clear from the articles that 'alienation' continues to be a controversial subject about which there is a range of views. In so far as those articles refer to the diagnosis of alienation, they are irrelevant to the decision I now have to make. I have found that S is alienated from his father. That finding was accepted by the Court of Appeal. What is of more interest from the research papers are the views expressed about transferring residence from one parent to the other as a means of dealing with the problem of alienation and in particular the views expressed (such as they are) about how this might be achieved and what risks are involved.

23. In *'Family Bridges: Using Insights from Social Science to Reconnect Parents and Alienated Children'*, Richard Warshak describes a Canadian project. 'Family Bridges'. Family Bridges is a workshop to which parents and children are directed

to attend by the court. The family members attend the workshop over a period of some four days during the course of which intensive work is carried out with them. On occasions, some degree of force is required to get the children to attend. Warshak says

> 'In 6 of these 8 cases, the judge ordered that the children be brought to the courthouse and the judge personally and authoritatively informed the children of the decision and affirmed that it was nonnegotiable. It is not uncommon for children to react by screaming, refusing to go, threatening to run away, sobbing hysterically, and, in one case, hyperventilating. Courts and parents deal with children's resistance in different ways. To minimise the risk of dangerous acting out, some judges have uniformed police officers and bailiffs in plain sight to emphasize the court's authority…In six of the eight cases, because of the degree of the children's alienation and the extent to which they felt empowered to override the court's authority, the rejected parent hired a professional adolescent transportation service to ensure the children's safe custodial transition and transportation to the workshop site.'

The research sample was small. The outcomes observed were positive.

24. Other authors profoundly disagree with this approach. In *'Early Identification and Prevention of Parent-Child Alienation: A Framework for Balancing Risks and Benefits of Intervention'* the authors (Jaffe, Ashbourne and Mamo) take a different view of forced handovers. In a passage relied upon by the mother's counsel, Miss Meyer QC, the authors say

> 'Given the recent cases and media attention, we are concerned that there may be an increase in the diagnosis of alienation and the promotion of intrusive interventions in cases where they are not warranted. There is potential danger of a misdiagnosis leading to change of custody, and children placed at risk if the rejected parent is abusive or neglectful, inadequate, or a virtual stranger to the child. There is also a risk that important attachment relationships with the

favored parent are disrupted or severed, resulting in traumatic separations and loss. Even if there is evidence of enmeshment and pathological bonding with the preferred parent, an abrupt termination of the relationship can be traumatic. This trauma may precipitate out-of-control behavior or even suicide attempts. Furthermore, changes in custody may disrupt children's social and school relationships that were previously important sources of stability and conflict-free zones for them. Teenagers can become angry, cynical and completely lose respect for a court that, from the child's perspective, arbitrarily denies their voice and appears to have a sole focus on parental rights.'

25. Dr W makes the point, correctly, that the authors do not give any indication of the evidence base for the assertions set out in that passage. In any event, that passage must be read in the context of the overall thrust of the article which is stated to be 'the need to focus on prevention through early identification and intervention that is affordable and accessible to separating parents.' The courts in England and Wales have for some years recognised the importance of early identification of high conflict cases. The fact that early intervention is undoubtedly important (a fact which in my opinion makes it more appropriate to describe these cases as 'high conflict' rather than as 'intractable contact') tells us nothing about how to effect handovers in the most severe cases of alienation such as that with which I am concerned.

26. Another of the papers is *'Parental Alienation: Canadian Court Cases 1989-2008'* by Bala, Hunt and McCarney in which the authors review cases of alienation that had been considered by the Canadian courts over a period of twenty years. Under a section headed 'Change in Custody', the authors say that

'The most dramatic judicial response to alienation is the transfer of custody from the alienating parent to the rejected parent…[The] court must determine that such action is in the best interests of the child(ren)…While the courts are reluctant to vary custody, as it can be very disruptive to children, in this study,

when a court found that alienation had occurred, the most common response was to vary custody. When such action was taken it was almost always in cases of severe alienation…

'Decisions to transfer custody in cases of alienation invariably recognize the immediate negative effect such a step is likely to have on the child(ren). However, a common theme is that this concern should be subordinated to the longer-term objective of maintaining healthy relationships between the child(ren) and both parents'

27. In light of the local authority's evidence about its proposals for contact with the mother, which I consider below, it is interesting to note from that paper that the authors observe that the cases show that

'When there is a change in custody, the court may determine that there must also be a suspension of contact with the alienating parent, at least for a period of time, to prevent undermining the relationship with the rejected parent.'

28. Another section of this paper is headed 'Police Enforcement' and also contains comments that are relevant to the issues I have to determine. The authors note that

'…an order for police involvement "…is an order of last resort…to be made sparingly and in the most exceptional circumstances". Because calling the police is a very intrusive step, many parents are reluctant to take it…As well as being very unpleasant for police officers, such involvement may cause children extreme distress, possibly "alienating them further from rejected parents who are viewed as the reason for such precautions".'

29. The final paper to which I refer is *'Children resisting Postseparation Contact with a Parent: Concepts, Controversies, and Conundrums.'* by Fidler and Bala. The authors note that

'Although contempt of court orders, reversal of custody and temporary suspension of contact with an alienating parent are important options in the judicial toolbox for dealing with alienation, they should be last resorts…'

30. The authors go on to ask a number of questions that are pertinent to the case before me. They say that

> ‘Several important questions surface when considering for a specific case the option of reversing custody to the rejected parent while suspending, at least temporarily, the child’s contact with the favored parent: Is the alienation emotionally abusive? Is custody reversal likely to cause more harm than good? That is do the short or long term benefits of placing the child with the once loved, now rejected parent outweigh the risks (trauma or harm) of temporarily separating the child from the alienating parent? Stated differently, which risk is greater: Separation from an unhealthy or enmeshed relationship or remaining in that relationship? What are the capacities of the rejected parent?’

31. Perhaps not surprisingly, the authors do not give clear answers to these questions. They note that some professionals are opposed to reversal of residence and others supportive. They explore the arguments of each group. The following passage is of interest so far as concerns the case before me. The authors say,

> ‘There is an assumption that in severe cases, all or most children are likely to be traumatized or go into crisis when separated from the alienating parent, who in many cases is likely to be the custodial mother. We do not have controlled empirical studies for this particular population comparing alienated children who were separated and those who were not separated from their favored parent and placed with their previously loved parent. Examination of the child protection literature may be instructive. Preliminary research from retrospective studies and clinical anecdotes reported by many seasoned clinicians suggest that for at least some children, a separation from the favored parent is liberating because the child is able to resume what was a deep attachment to the parent they have not been free to love in the presence of the favored parent. Amy Baker’s research…indicating that many children secretly wished that someone called their bluff and insisted they have a relationship with the parent they

claimed to fear or hate, is an important consideration when making these extremely difficult decisions. In the case where the child threatens self-harm in contemplation of a move from the custodial to the rejected parent, it is often difficult, if not impossible, to ferret out the cause for the child's distress be it the potential move or the ill effects of the alienation process. Further, it must be borne in mind that children left with a severely alienating parent are likely to experience emotional trauma and also may eventually engage in self-harm.'

32. The authors go on to note the ethical issues relating to coercion of children. They go on to make the point that

'It appears then, that the issue may be less about coercion per se and more about the nature and degree of the coercion, and further, for which cases it is appropriate, One needs to ask not only about the ethical issues of intervening when children protest, but also about the ethical issues when intervention is not provided to protect children from abusive parenting…'

33. Importantly, so far as this case is concerned, I note that the authors also say that

'Further, with few exceptions, commentators agree that in the severest of cases, which may present as such at the outset or later after various efforts to intervene have failed, custody reversal may be the least detrimental alternative for the child.'

34. One of the points relied upon strongly by Miss Meyer, for the mother, is that that there is a lack of relevant research on outcomes. I accept that there is some force in that point, though it is pertinent to note that these authors say that

'To date, there has been little well-controlled research on outcomes, either positive or negative, of ordering parenting time or reversing custody in alienation cases. It is important to recognize that this lack of research on the effect of these interventions to remedy alienation exist in the context of a growing body of research about the long-term harmful effects of alienating parental conduct on children (e.g., Baker), but only very limited research on

effects (or outcomes) of judicial decision-making related to court interventions in custody and access in general. Still, there is actually more literature and research…on the effects of custody reversal than on other interventions that are typically recommended or ordered, such as parent education programs, family-focussed or reunification therapy, parenting coordination, supervised visitation, a finding of contempt of court, or a judicial decision not to deal with alienation because of a concern about the trauma of a change or the limitations of the rejected parent.'

The evidence

Ms SK – Social Worker

35. Ms SK has filed a written statement in support of the local authority's application for an interim care order. She is the author of the local authority's interim care plan. She has given oral evidence at this hearing. Her written statement is dated 22nd February, exactly one month after the local authority became involved in this case. Coming to grips with the multitude of statements, reports and judgments has been no mean feat. In addition to familiarising herself with that material, Ms SK has also engaged with the mother and S and had meetings with the father and his family at their home. I warmly commend Ms SK for the care, commitment and industry she has shown since her involvement began. Her involvement has been exemplary.

36. Ms SK was at the professionals' meeting on 9th February which came up with the proposal for a phased handover of care over the period from 19th February to 4th April. Like everyone else who was present at that meeting, I have no doubt that she believed that plan to be in S's bests interests and that she genuinely believed and hoped it could work.

37. Ms SK visited S at home on 18th February. By then she had seen the statement made by the mother at court on 16th February and therefore knew that S had been very distressed to learn of my order of 4th January. Her discussion with him was long and detailed. S had many questions which she did her best to answer. He knew that the

first contact was due to take place the following day. He knew that if the plan for phased handover failed that the alternatives were either enforcement by means of the Tipstaff or the making of an interim care order. S told Ms SK that he would prefer to go into care than to live with his father. The meeting ended with Ms SK asking the mother to contact her if there was any sign that S would not attend the handover the next day.

38. On 19th February Ms SK received a telephone call from the mother at 11.20.a.m to report that S had said he would not attend the contact. Ms SK went round to the house. She says,

> 'I arrived at M's house at 12.15p.m. to talk to S. I said to him that his mother had told me that he was refusing to go to his father's house and I asked him how he had reached this decision. S told me that he had listened to all those people who talked to him, namely his mother, his uncle and myself. He had gone to the place of worship that morning to ask God for help and had listened to a particular prayer [which Ms SK attached to her statement]. S said to me "I will not willingly go and see my dad. I am fully aware that you can force me to go there, or you can take me away from my family and put me into care, but I will not willingly go." S was very calm during this conversation; there were no tears and no outward signs of distress.'

S refused even to go to the Cafcass office to tell his father face to face that he was not willing to do.

39. In the light of S's refusal, the local authority took the decision to issue care proceedings. In its original form the initial interim care plan proposed that upon placement in foster care Ms SK would undertake a minimum of 10 weekly direct work sessions with S with a view to changing his position towards his father and moving him on into his father's care once those sessions have been completed. As for contact, the plan said that

> 'It is envisaged that Mother will have some daily contact with S to be arranged

by Children's Services. It is envisaged that indirect contact will take place with Father within two weeks of S's placement. It is envisaged that direct contact will take place with Father at the foster placement arranged by children's services.'

40. In her oral evidence, Ms SK told me that she has been a social worker for some twenty years. In that time she has had experience of dealing with high conflict contact disputes and had supervised handovers of children caught up in such disputes. However, she also said that she has not been involved in any case where alienation has been found to have occurred and neither has she undergone any training in which the phenomenon of alienation has been considered.
41. The local authority has done exceedingly well to identify a culturally appropriate foster placement at such short notice. The foster father is of the same religion and would be willing to attend the same place of religious worship with S. That place of worship is also attended by the mother and members of her extended family. Unfortunately, Ms SK was not able to tell me what experience or understanding the foster carers have concerning the issue of alienation. It is not something she has discussed with them. She also did not have available to her any details about the experience of these foster carers – how long they have been approved foster carers and how many children they have fostered. Although the placement is a culturally appropriate placement, in all other respects there is at this stage a lack of clarity about the suitability of this placement for S given the findings the court has made and the purpose for which an interim care order would be made.
42. Ms SK clearly has some very real concerns about the risks to S of any handover involving the Tipstaff. She has never worked with the Tipstaff before and has very little knowledge of his work. However, she understood that if necessary it would be acceptable for him to use reasonable force to implement the handover and that worried her considerably. S has indicated to her the steps he would take if forced to go to live with his father. In her written statement she says

> ‘In the light of the issues raised, I am concerned that S, if forced to live with his father, will sabotage by self harm, either through not eating or trying to run away or jump out of his father’s car.’

In her oral evidence, Ms SK said that from her discussions with S, what she has seen is a young man who is preparing to put himself at risk. She believes that there is a very real risk that S will carry out at least some of his threats.

43. That brings me to the subject of religion. In her written statement, Ms SK says that during her first meeting with S and his maternal family

> ‘it became clear that S is an active and practising his faith. He prays every morning and evening and spends three to four evenings a week at the local place of worship. He is a vegetarian and leads the religious processions in the community. I am concerned that nowhere in the paperwork I have been given on this case, or in the discussions I have been a part of at court, have I been informed of this information. I feel that this needs to be clarified with both the paternal family and with the other professionals who have been working with S.’

This is a subject to which I shall return later in this judgment.

44. As Ms SK put it in her oral evidence, S’s practice of his faith has become a way of life for him. Ms SK said that, for example, S rises to say his prayers at 4.00a.m. each day; he attends the local place of worship four times a week. He is devout. Ms SK believes that his religious faith is now underpinning his resistance to the order that he should live with his father. She believes that his faith will enable him to carry out his threats of self-harm. S has said to her that he already has a mother, father and Protector, and that is God. His faith is helping him to defy what is being asked of him.

45. Ms SK makes the point, rightly, that if S goes to live with his father then it will be very important for him to be able to continue to attend the local place of worship and practice his religion as he does now. In that context, she noted that the paternal

grandfather, who would be living in the same household as S, is himself a scholar of the same religion. She said that when she met the grandfather recently he had become 'most animated' when he heard about S's religious practices. She accepted that that is encouraging.

46. The interim care plan proposes that whilst in foster care S should continue to attend the local place of worship. Although the local authority would seek to ensure that the mother did not attend at any time when S would be attending, Ms SK could see no difficulty in S meeting other members of his maternal family whilst at the place of worship.

47. Ms SK described S as a very gentle boy, softly spoken, articulate, very confident about his wishes and feelings. Although she had explained to him about the implications of an interim care order and a move into foster care, she was not sure that he fully understood all the implications of this. Although I had been told that S had indicated a willingness to go into foster care, Ms SK did not think it right to express his views in that way. His willingness to come into foster care is only because he objects to the alternative, which is immediate placement with his father.

48. The longer Ms SK gave evidence the more apparent it became that S has no real understanding (because he has been given no detailed explanation) of the local authority's intentions with respect to contact with each of his parents. Indeed, it became clear that there was a lack of clarity in the local authority's own position around those issues. The local authority hoped that that uncertainty would be overcome by an amended interim care plan filed at court during the hearing on 1st March. However, that amended interim care plan contains exactly the same proposals for contact as those set out in the earlier plan. The plan itself does not assist.

49. One therefore has to look to the detail of Ms SK's evidence to understand what the local authority intends so far as contact is concerned. It appears that the local authority now accepts that initially the mother's contact with S should be

supervised and that any telephone contact should be monitored. It also appears that the local authority intends the mother's contact to begin soon after, if not immediately upon, S's placement in foster care. I did not sense that Ms SK perceived any risk to that plan in terms of the mother's contact undermining the attempt to restore S's relationship with his father. She said that if the mother used contact to undermine the attempts to rebuild S's relationship with his father then the local authority would have to think about no contact. However, and I mean no disrespect in saying this, one wonders whether her lack of experience of dealing with alienated children would affect her ability to detect the subtleties of any attempt to destabilise the proposed direct work with S.

50. I was equally concerned about Ms SK's evidence in respect of the father's contact. The plan, as I have said, is for this to begin by way of indirect contact. However, the three principal judgments I have given over the last two years or so make it plain that all previous attempts at indirect contact have failed miserably. The parents have had weekly telephone calls on speaker-phone in the hope that S would join in. He has refused to do so save for the odd occasion when he has intervened to be rude to his father. The father has written to S. S has refused to read the letters. The father and his family have sent gifts. Although the mother says she has encouraged him to acknowledge them by sending a 'Thank-You' letter, S has refused to do so. Dr W met with maternal uncle and the father's sister, H, to agree how they should handle the proposed contact between S and his half brothers, L and N, in the summer of 2009. That, too, was a dismal failure. The last four years are littered with attempts to engage S. All have failed. Against that background, Ms SK was asked why she believed that a further attempt at indirect contact was appropriate now. Her response was that now it would take place with S in a position of neutrality (foster care) whereas before it had taken place whilst he was at home with his mother. It was clear from Dr W's evidence, which I come to later, that he sees no purpose in further attempts at indirect contact. Nothing short of face to face

contact is going to have any chance of breaking the ice.

51. I asked Ms SK to tell me about the direct work she proposes to undertake with S. She said that her sessions with him would last for around two hours. She would challenge S about his behaviour and about his reasons for cutting himself off from his father. These sessions would be video-recorded. The videos would be sent to the father. She would meet with the father fortnightly. He would be encouraged to respond to S's videos. His own discussions with Ms SK would also be videoed and those videos played back to S. Ms SK believes that this 'will shift this little boy'. Dr W profoundly disagreed. The guardian expressed concern.

52. Dr W said that he 'definitely disagreed' with this approach. He thought it likely that it would be used by S to present a pre-rehearsed diatribe in which he would probably make false allegations about his father. This would be very difficult for the father to respond to in a constructive way other than by denial. He was also anxious that for S's concerns to be recorded on video would make them, in a sense, public utterances which it would be difficult for S to retract later. As for the guardian, Ms J said that she hoped that Ms SK would undertake some validation of her approach at the end of the first session and that if it were found to be unhelpful that it would not be pursued.

53. I have already noted that the local authority's intention is that the placement in foster care should last for around three months. Ms SK though it likely that it would take that kind of timescale to move S on to a position in which he was willing to move to live with his father. Here, too, both Dr W and Ms J disagreed. Dr W would not envisage foster care lasting for more than a month. Ms J believes that there would need to be a review within three or four weeks. Both were of the view that if significant progress had not been made within the first four weeks then it was unlikely that foster care would achieved its desired objective.

54. It was also clear to me from Ms SK's evidence that the local authority does not really have what might loosely be called an 'exit strategy'. Over the years, in

considering all of the options in this case the 'what if' questions have always been the most difficult to answer. And so it is with the question 'what if S remains as hostile to his father at the end of three months in foster care?' I was not satisfied that that possibility had been adequately thought through by the local authority. Ms SK said that if no progress had been made at the end of the proposed ten sessions of direct work then 'the paternal family will have done everything possible'. She said that the sessions would inform her decision-making. There would at that stage be a range of possibilities from using the Tipstaff to enforce a residence order (at one end of the spectrum) to deciding that S should not go to live with his father (at the other). If S perceives that to be even the remotest of possible outcomes of foster care, it is not difficult to imagine what may happen.

Ms J – guardian ad litem

55. Because of her late re-introduction into this case, Ms J did not have time to prepare a written report. I do, though, have a detailed position statement filed on her behalf. Ms J has given oral evidence.

56. Ms J has considered whether S should be separately represented (i.e. separate from her). In her opinion S is Gillick competent. However, for the moment she perceives no disagreement between herself and S on the position she should take concerning the options for achieving a handover of care.

57. In her position statement the guardian reports that S presents as an intelligent and articulate child who is aware of the issues. She says that he challenges Dr W's assessment 'in an intelligent and articulate manner'. S says that he was not prepared for his meeting with Dr W in 2008 as his mother had not told him about it. That meeting is described at paragraphs 16 to 21 of my judgment of 15th June 2009. He does not accept that he is alienated from his father. He is adamant that his views about seeing his father have not been influenced by his mother. He added that his mum has encouraged him to see his father *'in recent times'*. He believes that he is being 'experimented' on (an expression used by the NYAS caseworker, Mrs K –

see paragraph 55 of my judgment of 4th January) and believes that he is being 'bullied' by the Judge. He strongly wishes to remain with his mother. He says that if his dad loved him then he would not force him to move. He is aware of the local authority's plan to re-introduce him to his father but remains resistant to this. He told her that 'by being in foster care he says he is able to prove that it is not his mother's influence but that these are genuinely his wishes.'

58. In her position statement the guardian says that she cannot support the use of the Tipstaff. She believes that this would lead to great distress and would be perceived by S as an act of coercion and bullying. In the penultimate paragraph of her position statement, the guardian says that

> 'S remains a very sad and agonised young person wanting to find any way of negotiating himself out of this situation including seeing another expert. He was aware of what separate representation meant and believed that separate representation would somehow strengthen his case for staying with his mother.'

59. In her oral evidence, Ms J confirmed that S is able to give a good account of himself. Contrary to Ms SK, Ms J does believe that S has a good understanding of the implications of a move into foster care. He does understand that the ultimate purpose of a placement in foster care would be as a stepping stone towards placement with his father.

60. Like Ms SK, Ms J accepted that she had no experience of being involved in a case in which the Tipstaff had been involved. Like Ms SK, Ms J is opposed to the use of the Tipstaff to enforce the transfer of care. She does not believe it will be helpful to use force. S himself has described the prospect as 'barbaric' and as treating him like a 'criminal'. She believes that it would be counter-productive. She thought it would further damage S's relationship with his father and could lead to longer term problems. She had told S that if the Tipstaff were used then that would not be his father's decision but the court's. S did not accept that. Having spoken to her professional body she had been advised that it would not be appropriate for her to

be involved in enforcement by the Tipstaff. However, she would be willing to travel to the father's home that same day to see how S was following his arrival there.

61. As for S's threatened acts of self-harm and defiance if forced to move, Ms J described S as a single-minded boy who could act on his negative feelings by, for example, not eating or not doing his schoolwork. She said that he is calm, collected and rational in the way that he makes his threats. This led her to have some concern. However, she did not think it likely that he would make an attempt on his own life by, for example, jumping out of his father's car. S had made no suggestion of similar self-harming behaviour were he to be moved into foster care.

62. Ms J believes that a period of 'neutrality' in foster care would be a helpful way to smooth the transition from mother to father. However, as I noted earlier, she considers the local authority's proposal for a three-month stay in foster care to be too long. As for how the time in foster care is used, her view is that the priority is to re-establish contact between S and his father.

63. I asked Ms J, as I also asked Dr W, what she would propose as an appropriate handover arrangement if I were to give the mother one final opportunity to engage in an orderly handover that did not involve the use of the Tipstaff. Ms J agreed with Dr W that the only realistic option would be for the mother herself to take S by car to his father's home. As she put it, if this were her child that we were talking about then, as his mother, she would very much want to oversee the handover herself no matter how much she disagreed with it.

<u>Dr W – Consultant Child and Adolescent Psychiatrist</u>

64. At my request, Dr W provided some initial advice for the hearing on 26th January by means of a letter dated 25th January. He attended the professionals' meeting on 9th February. He took part in a telephone conference call with counsel on 23rd February in which he responded to a list of questions which I had approved at the directions hearing that same day. He has also given oral evidence.

65. In his telephone advice given on 23rd February, Dr W dealt first with the local

authority's interim care plan. He asked whether the local authority could confirm that under no circumstances would the local authority return S to his mother's care. Although Mrs G confirmed the local authority's intention to support the implementation of my order of 4th January, she also made the point that it would be wrong for her to say that there are no circumstances in which the local authority would change the plan.

66. Dr W asked whether, if S still refused to move to his father voluntarily, the local authority would agree that force could be used. Mrs G said that if, after the local authority's work with him, he still refused to move to his father then the local authority would stand back and allow the Tipstaff to implement the move.

67. In the light of those indications, Dr W then went on to address the interim care plan. He said that in his opinion it is too vague in terms of timescales and goals. He disagreed with the proposal for S to have daily contact with his mother. If that happened then, in his opinion, change would not take place. He was concerned that the local authority appears to be treating S's wishes and feelings as rational, which suggests that there is a basis for negotiations. It has to be clear to S that there is no basis for negotiations. He did not believe that the direct work proposed would move the case forward. He expressed concern that the harm of removal would be greater if S is removed to foster parents and then subsequently forced to transfer to his father's care.

68. Dr W was asked for his assessment of the risk of S self-harming. He points out that there is no history of S having harmed himself in the past. In his opinion, it is unlikely that he will harm himself once transferred to the care of his father.

69. In the event that S does go into foster care, Dr W's view is that direct contact should begin as soon as possible and subject to the father's availability should, if possible, take place daily. He could see no purpose in indirect contact. All attempts at indirect contact in the past have failed and he could see no reason to believe that a further attempt would work. So far as direct contact is concerned, Dr W said that

he was ‘looking at the first visit being very long and to be kept going until S is prepared to answer his father and…look him in the eye ending in a change in attitude’. That could take some hours.

70. Dr W emphasised the importance of the situation being monitored by somebody who has experience of alienated children. He said that there needed to be someone who ‘can tolerate behaviour without panicking, who is not made anxious by behaviour which can appear quite worrying.’

71. As for contact between S and his mother, Dr W said that there would initially need to be a ‘considerable restriction’. Initially, there should be telephone contact only and this should be short and should be monitored.

72. Dr W was asked about the importance to S of his religious and spiritual life and its impact on his advice about implementation of the change of residence. Dr W did not see this as a problem. On the contrary, he would hope that his religious belief would help him in his adversity. He was, though, concerned about S’s attendance at the local place of worship if he were placed in foster care, and in particular about what he referred to as ‘uncontrolled contact’ which he believed could place other adults in a difficult situation.

73. Overall, it is clear from the notes of that conversation that Dr W favoured an immediate move to father’s care and believes that there is every reason to believe that within a very short time S would be able to re-establish a normal relationship with his father. As he put it in his oral evidence, S would be moving to a particularly strong household with people who have known him well. He made the point that everyone who has interviewed the father and his family have been impressed with them.

74. Like Ms SK and Ms J, Dr W has no experience of working with the Tipstaff. In his oral evidence, Dr W said that if the Tipstaff were to be the person who effected the handover then he thought it would be helpful for a third party to be present, a professional whom S knows. Given that both Ms SK and Ms J rule themselves out,

he would be willing to be present himself and to travel with the Tipstaff and S down to the father's home..

75. Dr W was less concerned about the risks of the use of force than either Ms SK or Ms J. He accepted, however, that the use of force would inevitably be traumatic and could potentially lead to what he called 'acting-out' behaviours. Given those risks, if S were willing to co-operate in a move into foster care and if the care plan were appropriate then he could see that there would be merit in that proposal. However, as I have already indicated, it is clear that Dr W considers that this care plan, even in its amended form, falls a very long way short of what he would consider appropriate for dealing with a child who has become severely alienated from his non-resident parent. He still considers it to be vague. He does not believe it is likely to advance matters. He does not know – and, indeed, neither does the court know – what experience the foster carers have of dealing with an alienated child. Mr Vater, counsel for the local authority, suggested to him that he should himself have interviewed the foster carers. I disagree. It is the local authority that advances these foster parents as appropriate carers for this child. It is for the local authority to provide the court with sufficient information to enable the court to assess their suitability. It has not done so.

76. Dr W said that he wanted to be convinced that the local authority's plan would work. It is clear that he remains unconvinced. In answer to questions put to him by Miss Rodgers, on behalf of the Children's Guardian, Dr W said that it is the local authority's care plan that dissuades him from going down the foster care route. He is concerned about what he referred to as the 'nuts and bolts' of the care plan. In his opinion the care plan needs major changes, in particular as to the proposed contact arrangements for each parent and the direct work that is being proposed. He also remains concerned about the local authority's timescale. As he put it, by the end of four weeks in foster care S and his father need to be going out alone together. If that had not happened by the end of the first four weeks then the foster care option

would have failed.

77. Dr W was reminded more than once of advice he had given in writing in October 2008. The letter was written to answer a number of specific questions. One of these asked

> 'Would a Section 37 Report leading to the possibility of the making of an interim Care Order assist S in being reintroduced to father – to be used either as a bridging process to allow contact to happen or as a precursor to a change of residence'.

This was Dr W's answer:

> 'It is possible that the Local Authority (LA) might be helpful in promoting contact or by providing foster care as a bridge to contact or a change of residence. However I have experience of only a handful of cases leading to the involvement of Local Authorities. My experience suggests a degree of variability in the availability of resources, willingness to become actively involved, and in the approach taken. For the L A to become involved it would be necessary for there to be Findings of emotional abuse by the mother.'

78. Dr W was asked by Miss Meyer why it was that having considered that route a possibility in 2008 he now appeared to reject the possibility of an interim care order as a route to bringing about the change of residence. He said that at that time he had not appreciated that that route would be open in the absence of a finding that the mother had caused S significant emotional harm. In answer to questions from Miss Rodgers, he said that his reluctance to go down the interim care route now was, as I have already noted, because of the 'nuts and bolts' of the interim care plan.

79. Mr Vater suggested to Dr W that this is a finely balanced choice between foster care and use of the Tipstaff. Dr W responded by making the point that it is important to look to the longer term. It is necessary to balance the risk of harm against the chance of success so far as each of these two options is concerned. It was put to him by Miss Rodgers that the use of the Tipstaff would involve taking a

'brutal risk which may be catastrophic'. Dr W disagreed.

The law

80. In my judgment of 4th January I set out in detail the applicable law. What I said in that judgment remains relevant to the determination of the handover arrangements. In particular, I remind myself that in making that decision S's welfare must be my paramount consideration (s.1(1) Children Act 1989). In determining what is in the best interests of his welfare I must have regard to all of the factors set out in the welfare checklist in s.1(3). Section 1(2) requires me to have regard to the general principle that any delay in determining the issue before me is likely to prejudice S's welfare. Given that six weeks have now passed since the Court of Appeal gave its judgment and more than two weeks since S was informed of my decision, I am in no doubt that s.1(2) now assumes some importance in this case. I must also have regard to the Art 8 rights of S and his parents and must endeavour to arrive at a conclusion that is both proportionate and in S's best interests.

81. I have noted that the professionals meeting on 9th February agreed that if the plan for phased handover failed then the making of an interim care order was one means of enforcing my order of 4th January. I have also noted that the local authority has now issued care proceedings. There is one relevant authority on this issue and that is *Re M (Intractable Contact Dispute: Interim Care Order)* [2003] 2 FLR 636, a decision of Wall J. (as he then was). It is appropriate to set out in some detail the guidance he gave and the circumstances in which he gave it. His Lordship set out the background to his order thus:

> [2] The case concerns two children, and what has become known as an intractable contact dispute. In this instance, the residential parent had persuaded the children (quite falsely) not only that the non-residential parent had both physically and sexually abused them, but also that the non-resident parent's own parents, with whom the children had previously enjoyed a perfectly normal relationship, were also physical abusers and a threat to the children. The result

was a cessation of all contact between the children, the non-residential parent, and the children's wider family on that side.

[3] The solution I adopted in this case was an order under s 37 of the Children Act 1989 addressed to the local authority inviting it to consider taking care proceedings to enable an assessment of the children's relationships with their parents to take place under the aegis of an interim care order. I had come to the clear conclusion that the children were suffering significant harm in the residential parent's care. It had, furthermore, become clear that an assessment of the kind needed could only take place if the children were not in their own home.

[4] The local authority, as a result of its s 37 investigation, agreed with my analysis that the children were suffering significant harm in their residential parent's care, and began care proceedings. As it was impossible to conduct an assessment of the children at home, they were removed under an interim care order.

[5] Within a very short space of time, and freed from the need to accommodate the residential parent's false belief system, the children rapidly resumed their relationship with the non-residential parent, in whose favour I later made a residence order.

82. His Lordship then went on to give the following guidance on the use of interim care orders as a means of resolving a high conflict contact dispute. He said

[6] I have decided to publish my two principal judgments in this case in order to demonstrate one method of addressing an intractable contact dispute. I am immediately conscious, of course, that the case turns on its particular facts, although the phenomenon it represents is by no means uncommon. This was the second time I had used the s 37 procedure to remove children who were being denied all contact with their non-residential parent, and were suffering significant harm because of the residential parent's false and distorted belief

system about the non-residential parent, which the children had imbibed.

[7] I am also conscious of the fact that there is a tendency in family law to see an outcome such as this as a panacea – a one-size-fits-all solution. I emphasise that this is not the case, indeed, this judgment comes with a series of strong health warnings.

[11] Although this case is but an example, it does seem to me that it is possible to extract some general considerations of wider application from it. I put these forward tentatively, as each case is different, and what fits one may not fit another. Some points are self-evident, but need stating nonetheless. I will state them in short form and then expand on them where necessary:

(The court must be satisfied that the criteria for ordering a s 37 report are satisfied…

2) The action contemplated (removal of the children from the resident parent's care either for an assessment or with a view to a change of residence) must be in the children's best interests. The consequences of removal must be thought through. *There must, in short, be a coherent care plan* [emphasis supplied] of which temporary or permanent removal from the residential parent's care is an integral part…

[22] It has to be acknowledged that the s 37 process is heavy on resources and takes time. At the same time, the stakes for the children are very high. Decisions to remove children from the homes they know and in which they feel secure are difficult. The consequences can be traumatic.

Submissions

83. I am grateful to counsel for their very helpful written submissions and for their willingness to provide them within such a short timescale.

84. As for the father, having reflected on the evidence before the court he stands by his position that placement in foster care under the proposed interim care plan is

unlikely to achieve the outcome provided for by my order of 4th January. Though acknowledging the local authority's genuine attempts to be of assistance in this case, Miss Ball QC makes the point that the local authority's evidence and care plan demonstrate its lack of understanding of the particular problems involved in dealing with children who have become alienated from a parent. In particular she makes the point that Ms SK's only knowledge of alienation comes from her reading of the papers in this case and some limited research on the internet.

85. Miss Ball also doubts the sincerity of the local authority's indication that it would make good its lack of knowledge about the phenomenon of alienation by seeking advice from Dr W. She makes the point, fairly in my judgment, that there has been little evidence that the local authority has taken account of Dr W's advice in formulating its amended interim care plan.

86. In her dealings with the mother Ms SK has believed the mother to have been co-operative. Miss Ball points out how easily other professionals have been taken in by the mother. She submits that the mother's alleged co-operation is belied by her actions. Miss Ball also points to an extract from the minutes of the professional's meeting on 9th February which record that

> 'mother said that had she known the move was a possibility she would have made it clear to S that he must accept contact with his father. The difference for mother is that the Order has been made by the Court.
>
> 'Dr W asked what mother's exact words were here. He wished to know if mother meant that she would have tried harder herself, or if she put the responsibility on S.
>
> 'Ms SK clarified that at the first meeting mother said that she would have "made him go".'

87. The following passage from Miss Ball's written submissions sets out the essence of the father's position. She says

> 'This court, knowing well the likely level of resistance of S, given the history of

this case, has already made that decision which has been approved by a higher court. The present choice is how best to carry it out so that it will be a viable order. It is submitted that the court should not be distracted by what are clearly delaying tactics on behalf of the mother and S nor the understandable queasiness of the child-care professionals, given their limited knowledge of the background and in particular of the mother's ability as a doctor with a psychiatric speciality to manipulate individuals to side with her and to manipulate her son and at times other members of the medical profession.'

88. As for the mother, Miss Meyer returns to an attack on Dr W begun at earlier hearings before me and repeated in the Court of Appeal. After reviewing the research papers to which I referred earlier, Miss Meyer says that

'In the light of the above it would appear that Dr W has not adopted the standard or rigour of approach the court is entitled to expect of an expert witness. His optimism as to the inevitable success of his approach and pessimism he addresses to the approaches suggested by others is flawed. His own assessments as to how S will or will not respond are based on generalisations (which the published papers very clearly warn against) rather than as a response to S's particular circumstances and characteristics. He is unable to provide advice based on this approach as he was unable to achieve his own assessment of S in July 2008, he has not seen S since then and he did not even suggest that it may in fact be appropriate for him to do so before offering any advice to the court as to the proper route to achieve a transfer for this specific child. The direct understanding he has been able to gain of S as a specific child therefore is negligible. Neither, as his oral evidence revealed, did he feel it appropriate to make any further enquiries of the Local Authority as to what could be put in place for this child if the interim care route were followed.'

89. Miss Meyer says that 'It is perhaps not surprising that their initial care plan may require fine-tuning as their knowledge of the case, the personalities, the

characteristics of the child and the concerns of the court grew.' Apart from that sentence, Miss Meyer does not go on to analyse the concerns that have been expressed about the interim care plan – the length of the stay in foster care, the proposals for contact both with mother and with father, the concerns about S still attending the local place of worship, the nature of the direct work which Ms SK intends to carry out with S. Those concerns, if accepted by the court, would lead to more than a requirement for 'fine-tuning'.

90. Not surprisingly, the mother is firmly opposed to the involvement of the Tipstaff in the handover arrangements. In addition to setting out concerns about the potential for emotional and physical harm, Miss Meyer also raises an interesting argument under Art 5 of the European Convention on Human Rights and Fundamental Freedoms. She puts her case thus:

> 'S's Human Rights include the right to liberty and security under Article 5 of the European Convention on Human Rights and any deprivation of his liberty (save in accordance with the specific cases set out in Article 5(1))would represent a breach. His forced repatriation by car to the South East – locked in to prevent him jumping out – would on the face of it represent a deprivation of liberty. If such action is taken for failure to comply with a residence order that would not immediately appear to fall within one of those provisions, the only potential applicable provisions would be detention of a person for non-compliance with the lawful order of the court (query whether the child who is the subject of a residence order can be regarded as having a failed to comply). It certainly does not sit easily within the provisions specifically directed to minors where the only possibly relevant provision would be that providing lawful detention for the purpose of bringing him before the competent legal authority (not for driving him to his father's home). It is difficult to see how any order directing the mother to do a certain act can be used to justify the deprivation of liberty of the child. In the circumstances of this case adopting this route is likely

to be fraught with legal difficulties and challenges which will no doubt result in additional delay before any such order could be legitimately operated upon.'

91. The mother endorses the local authority's proposal that there should be an interim care order based on the interim care plan before the court. It is a plan with which S is willing to co-operate. It is a plan which the mother is willing to support. It is the closest situation for S to a consensual route forward. He has not threatened self-harm if moved into foster care. He would have support from Ms SK, a highly skilled worker. It would provide an 'air-lock' between mother's care and transfer to father's care. It is a route that is not without precedent in UK jurisprudence. Any delay which this approach might lead to would be planned and purposeful. This is the least harmful course of action for S and the one which offers the greatest prospects of success.

92. As for the local authority, in his closing submissions Mr Vater makes it clear that the local authority stands by the amended interim care plan placed before the court on Monday. He says, rightly, that if the court is concerned about the local authority's proposals for contact with the parents then it can regulate that at the outset by means of an order under s.34. If those were the only concerns that had been expressed with the interim care plan during the course of this hearing then that may be an appropriate avenue to pursue. But as I have noted at various points throughout this judgment, that is not the only significant concern about the care plan.

93. Like Miss Meyer, Mr Vater is highly critical of Dr W. Though he does not adopt her description of Dr W as a 'suggested expert' he does refer to him in equally pejorative terms as 'an "alienation" evangelist'. If that is the view of the local authority, and I must assume that it is, it does not bode well for the prospect of the local authority being willing to consult with, and more importantly being willing to act on, any advice that Dr W might give.

94. That that is the local authority's view of Dr W is reinforced by a further passage in

Mr Vater's submissions, in which he notes says that

> 'Furthermore, it was the Guardian's evidence that even with an immediate and forced transfer, the father and his family would need significant professional support after the boy's reception into care. The ONLY way that can be provided is by an Interim Care order in favour of the Authority. Dr W's response, that almost by magic the problems would simply disappear is not only 'counter-intuitive' [Dr W's expression], it cuts across ALL common sense and the extensive experience of the professionals involved in the case. It was, again, a cavalier, and frankly bizarre opinion'.

95. In what I confess I found to be unusually emotional closing submissions, Mr Vater draws his submissions towards a close with the following paragraph:

> 'Whilst the LA has the greatest of respect for Dr. W's professional opinion, it has based its own opinions on years of 'hands on' experience combined with the beginnings of a relationship with THIS boy. This boy does not have a disease. He is not mentally ill. He is suffering as a consequence of a certain type of parental abuse, which happens in some quarters to carry a 'diagnostic label' (of the type we know, and regret, well: MSBP, for example). Whatever label it is given, it is emotional abuse of a certain type, and the Local Authority has a huge wealth of experience in attempting to heal emotionally abused children.'

As Ms SK made clear in her evidence, that 'huge wealth of experience' does not include attempting to heal a child in respect of whom the court has made a finding that that child has become alienated from one of his birth parents.

96. Mr Vater submits that S's case 'is absolutely unique in the extensive experience of the Court appointed expert'. I accept that that was Dr W's evidence. I accept the lack of significant research evidence directly on the point. However, I noted earlier (see paragraph 34 above) some pertinent comments in one of the research papers to which I have been referred.

97. Mr Vater saves his most stinging attack for all those who, down the years, have

failed to advocate, or failed to order, that there should be an investigation by the local authority under s.37. He says

> 'The Local Authority rejects entirely the proposition that "no stone has been left unturned" in attempting to re-establish contact between A and his father. At no stage in these YEARS of litigation did any party to these proceedings, or the Court itself, seek to involve the Local Authority pursuant to section 37 (notwithstanding clear findings in relation to the harm this child was suffering, even after Dr W had telegraphed the potential helpfulness of Local Authority involvement [in October 2008]).'

98. There are two immediate points to be made in response to that criticism. Firstly, as Dr W's letter of 2nd October 2008 makes clear, the possibility of a direction under s.37 has been considered. Secondly, it is interesting to note that the first, and I believe only, judgment to be published concerning the use of interim care orders in high conflict cases was *Re M (Intractable Contact Dispute: Interim Care Order)*, to which I referred earlier. It is even more interesting to note that that was a decision of Wall J. (as he then was) who happened to be a member of the constitution of the Court of Appeal which rejected the mother's appeal in January. I have re-read His Lordship's judgment very carefully and can find not the slightest suggestion that use should have been made – or, indeed, should now be made – of s.37.

99. As for the Children's Guardian, Miss Rodgers acknowledges the balance that must be struck between ensuring that the order of 4th January is implemented with the least distress or harm to S whilst at the same time achieving a handover which enables the relationship between S and his father to be re-established. The guardian's position is that that would most appropriately be achieved under the auspices of an interim care order and a temporary placement in foster care. So much is what I understood from the guardian's oral evidence.

100. What I find surprising, in the light of the evidence I have heard, is Miss Rodgers' statement that the local authority 'have produced a care plan which (in general

terms) the Guardian approves, although the time frame is too long'. When outlining the guardian's evidence earlier in this judgment I highlighted a number of areas, not just the proposed length of the foster placement, in respect of which the guardian expressed concerns about the current interim care plan.

101. Miss Rodgers highlights the guardian's concerns about a forced handover. This is clearly a prospect that the guardian is completely unable to come to terms with. Miss Rodgers expresses this in stark terms. She says that

> 'Given Dr W's evidence that the later and longer it is before contact is begun, the harder it is to resume contact, the Guardian has very real concerns that what now may be only obtainable by brute force, will equally fail, and that the boy may be traumatised by such actions.'

That, with respect to Miss Rodgers, appears to be as much a challenge to the residence order itself as it is to the enforcement of that order. The mother's attempt to overturn the residence order has failed.

102. In addition to her concerns about the use of force, Miss Rodgers goes on to say that the guardian is concerned about the additional emotional pressure that might be caused by a forced handover. She is concerned about what Miss Rodgers calls S's 'steely resolve' which could lead to him self-harming.

103. Perhaps the most beguiling of Miss Rodgers' submissions is that

> 'the suggested approach of the Local Authority commends itself to the Guardian as the best way forward to bringing this matter to a safe conclusion. After 10 years of litigation, another 4 weeks will not add anything'.

That submission takes no account of the fact that the local authority is not proposing a 4 week but a three month stay in foster care, that there are other aspects of the care plan with which the guardian has expressed concern and that the care plan shows little understanding of the phenomenon of alienation.

<u>Welfare checklist analysis</u>

104. Having reviewed the parties' submissions I turn now to my analysis, beginning

with the welfare checklist. I do not intend to go slavishly through each and every item in the welfare checklist in s.1(3) of the Act. It is unnecessary for me to do so. However, the following factors appear to me to be relevant to the issue now before me.

105. Section 1(3)(a) requires me to take account of S's wishes and feelings, considered in the light of his age and understanding. In my judgment of 4th January I noted Dr W's evidence that S's expressed wishes and feelings are irrational and should not be taken at face value. The approach I took in that judgment still holds good. I hear what S is saying. I acknowledge his pain and distress. But the reality is that I am now unable to respond to his expressed wishes and feelings in the way that he would want because the decision that he should move to live with his father is a decision that has been taken and upheld by the Court of Appeal. Although I acknowledge that he has said he would go willingly into foster care, it is clear that he has only said that in order to avoid the alternative, which he regards as a worse alternative, and that is that he should move immediately to live with his father. I am desperately sorry that he is so distressed but, so far as the issue of residence is concerned, we have now passed the point of no return.

106. Section 1(3)(c) requires me to take account of the likely effect on S of any change in his circumstances. Again, the analysis set out in my judgment of 4th January under this heading holds good. The reality is that leaving the full-time care of his mother will be painful and distressing for S. That is unavoidable. It is difficult to know which of the two options would be the more distressing for him. In the short term, I can understand why some would say that immediate placement with his father would be the more distressing, particularly if the assistance of the Tipstaff were required to achieve that outcome. However, there is clear evidence from Dr W, supported by some of the research papers to which he has referred, to the effect that such distress could be short-lived. An immediate move into foster care could initially be less distressing. However, if the local authority followed Dr W's advice

about contact with his parents (and for the moment it does not appear that the local authority is disposed to do so) then S could become distressed quite soon after the placement has begun. If, despite the local authority's best efforts, S could not be brought to the point of re-establishing his relationship with his father then the involvement of the Tipstaff at that point might still be necessary, as the local authority itself acknowledges. In short, either option is likely to involve distress.

107. Section 1(3)(d) requires the court to take account of S's age, sex, background and any characteristics of which the court considers relevant. It is at this point that I return to the issue of S's religious beliefs and practices. I share Ms SK's surprise that prior to her involvement the fact that S is a devout, committed and practicing member of his religious faith had apparently not been picked up by any other professional involved in the case. In December 2007 I noted in my first judgment that up to that point there had been two Cafcass officers, two guardians, three independent social workers, two therapists and one psychiatrist involved in this case. It is fair to make the point that in the early years, when S was very young, S's religious beliefs would not have been formed. However, during the last two years, since the date of that judgment, not only has the NYAS caseworker had significant contact with S yet failed to pick up on this important feature of S's life, the mother herself has given evidence, at length, on two occasions and has not seen fit to mention it. The lack of evidence about this issue during the last two years is, to put it mildly, a curiosity.

108. I unhesitatingly accept that S's religious beliefs and practices are profoundly important to him. I have the greatest respect for his beliefs and am deeply impressed with his devotion and commitment. I accept that it is important that he be both permitted and, more importantly, encouraged, to develop and live by his beliefs as he grows up. However, nothing I have heard from any of the witnesses at this hearing suggests that he would be any less able to do that whilst living in foster care or with his father than he is able to do at the moment whilst in the care of his

mother. Indeed, the fact that his grandfather is a scholar of the same religion may mean that the court can be confident that in his father's care his religious needs will not only be met but will be respected, honoured and promoted.

109. The last of the factors in the welfare checklist to which I wish to make specific mention is s.1(3)(e) which requires the court to take account of any harm which S has suffered or is at risk of suffering. Once again, the analysis of this factor in my judgment of 4th January still holds good. However, I must now also consider the risk of harm which may arise as a result of the implementation of my order. Given that S says that he would go willingly into foster care but would resist enforcement of a move to his father's care, I accept that there is some reason for saying that the risk of harm by a move into foster care is lower than an enforced move to the care of his father. However, I also consider that assessment to be superficial. I am concerned not just about the harm that occurs in the hours and days immediately following his departure from his mother's care. I am also concerned about the longer term risk of harm. I have referred extensively to the research papers produced by Dr W. I accept that there is no empirical research on the question of the short and long-term harm that may be caused by an enforced transfer of care under the authority of the Tipstaff. However, Dr W's evidence, supported as it is in many respects by the research papers to which he refers, leads me to believe that when taking a long view there is no sound reason for coming to the conclusion that a move into foster care is likely to be the less harmful option.

Discussion

110. I begin my more general discussion by reminding myself again that S is the focus of my decision-making. I set out my understanding of that at length in my earlier judgment and don't intend to repeat it. I am concerned to arrive at a solution that is in the best interests of his welfare. About that, I am very clear indeed.

111. I begin by considering the proposal that there should be an interim care order and that S should be placed in foster care. That approach is agreed by the local

authority, the mother and the Children's Guardian. The threshold that must be met before the court may make an interim care order is set out in s.38(2) which provides that

> 'A court shall not make an interim care order…under this section unless it is satisfied that there are reasonable grounds for believing that the circumstances with respect to the child are as mentioned in section 31(2).'

No-one, not even the father, has suggested that that threshold is not satisfied in this case. I accept that it is.

112. Once the court is persuaded that the s.38(2) threshold is satisfied, the court must then make its decision based upon the principles set out in Section 1 and Article 8. In the particular circumstances of this case, where the purpose of an interim care order is a means of achieving the end set out in my order of 4th January, it is important to have regard to the guidance given by Wall J. in *Re M (Intractable Contact Dispute: Interim Care Order)* [2003] 2 FLR 636 to which I referred earlier. As Wall J. said, the use of an interim care order to deal with an intractable contact dispute is not a panacea, it is not a one-size-fits all solution. Sometimes it may be appropriate. Sometimes it may not.

113. If going down the route of an interim care order, I regard of real significance in this case the caution given by Wall J, that 'there must, in short, be a coherent care plan'. Is this local authority's care plan a coherent plan? In my judgment, it is not. For all my praise of the work Ms SK has undertaken, and it is praise genuinely given, her inexperience in dealing with cases of alienation shines through both her evidence and her care plan.

114. I am in no doubt whatsoever that when S leaves his mother's care, whether to go into foster care or to go to his father, it will be necessary for direct contact to be stopped and for indirect contact by telephone to be short and monitored. If that does not happen, the risk of that contact undermining the attempt to re-establish S's relationship with his father is, I believe, overwhelming.

115. I accept that in foster care it would be vitally important that S should be able and encouraged to continue to follow his religious beliefs and practices. But to allow him to go to the same place of worship where there is a high likelihood of him meeting members of his maternal family – family members who are hostile to the orders I have made – is to court problems.

116. To suggest that S's contact with his father should begin with indirect contact only is, I regret to say, the triumph of hope over expectation. I accept completely that in the past indirect contact has been attempted when S has been living with his mother but has never been attempted when he has been away from her care. However, S's refusal to engage in any form of indirect contact in the past, despite the best efforts of the court and of a number of professionals, gives no cause for believing that his response would be any different whilst he is in foster care, the more so if, as appears to be the case, he does not agree with the plan that foster care should be but a first step in a process that will lead to him living with his father.

117. I fully accept the good intentions that lie behind the proposal to undertake direct work with S over a period of ten weeks. Yet, as I observed earlier, Dr W profoundly disagrees with that approach and Ms J clearly has reservations about it. In my judgment it has the potential to do more harm than good. There is no evidence that such an approach works with children who are severely alienated.

118. The local authority's plan is for S to spend around three months in foster care. Again, both Dr W and Ms J consider that period to be too long. As Dr W put it, if by the end of four weeks S and his father are not going out alone together, then foster care will have failed and a continuation of the placement would be pointless.

119. Miss Meyer has once again been severely critical of Dr W and has sought to challenge the evidential base for some of his views. I note that in the Court of Appeal, Lord Justice Thorpe said that after my judgment of 13th December 2007

> 'the highly experienced child and adolescent psychiatrist, Dr W, was instructed to advise. Dr W has made a speciality of highly conflicted contact disputes, and

his instruction was therefore particularly appropriate.'

In the light of that observation, I was surprised to read Miss Meyer's caution that 'The Court should be very wary indeed of allowing itself to be unduly swayed by or to blindly follow the views expressed by Dr W because of his *suggested* [my emphasis] status as an expert in "alienation" cases.'

120. So far as the local authority's interim care plan is concerned, prepared as it has been by someone with no experience at all of dealing with alienated children, I unhesitatingly accept Dr W's criticisms of that plan. I am satisfied that that care plan is not 'a coherent care plan'. However, though I am severely critical of the interim care plan it does not inevitably follow that I should discount the possibility of making an interim care order. It is, I accept, open to me to adjourn again with an invitation to the local authority to reconsider its care plan.

121. The alternative to an interim care order would be what? Throughout this judgment, and based upon the agreement reached at the professionals' meeting on 9th February, it has been assumed that the alternative is an enforced transfer under the hand of the Tipstaff. I consider that possibility in a moment. However, before doing so it is right to point out that that is not the *only* alternative. Another alternative, suggested by both Dr W and Ms J, is that the mother is given one final opportunity to engage in an immediate consensual handover by taking S down to his father's home in the South East. I paraphrase Ms J's evidence, and I hope she will forgive me if I do so inappropriately, in which she appeared to say that that is what she would wish to do if she were in the mother's shoes and this were her child. In the light of that evidence I was surprised to read Miss Meyer's submission that to give the mother one final opportunity to engage in a consensual handover 'would be an entirely hollow and meaningless cynical device in the circumstances of this case'. I do not accept that submission. Before I turn to consider the possibility of enforced handover, let me make it very clear that I do not regard that to be the only, or indeed the inevitable, alternative to foster care.

122. The possibility of involving the Tipstaff in the handover arrangements has caused high emotion. S himself has referred to it as 'Barbaric' and treating him like 'a criminal'. Miss Rodgers said that such a handover would involve taking a 'brutal risk which may be catastrophic'. Both Ms SK and Ms J were plainly unable even to contemplate the use of force to ensure that the transfer of care is effected in accordance with the court's order. The first point to make is that none of those to whom I have referred have any direct experience of being present when the Tipstaff has enforced an order such as this. So assumptions are being made.

123. The second point to make is that acknowledging as I do that there is no research evidence directly addressing the question of the impact of forced removal from one parent to the other, it does not follow that the court is bound to come to the conclusion that a forced handover will inevitably cause long term emotional harm. The absence of research means that we simply don't know the answer to that question. Whilst some may wish to criticise Dr W for his apparent willingness so readily to countenance such an approach despite the lack of any research evidence to support it, it must not be forgotten that Dr W is a Consultant Child and Adolescent Psychiatrist with immense experience of working with children and, as the Court of Appeal noted, with significant experience of working in the field of alienation. Whilst an opinion backed by clear research evidence may represent the gold standard, an opinion based on years of experience working as a child psychiatrist is not to be discounted merely because there is no research evidence to support it.

124. The third point to make is that I accept that there is a real risk that if transfer has to be effected by the Tipstaff that force will be necessary. I accept that S's distress is likely to be even greater than that described by his mother upon him being told of my order. I think it quite possible that S would resist. The Tipstaff's task would be a difficult one. The presence of Dr W may help, though even that would be unlikely to dampen the immediate distress and anguish. All of that I regard as not just

foreseeable but likely. The real issue, and it is an immensely difficult issue, is to assess the harm that might be caused to S. There is clearly a risk of physical harm, though in my judgment the greater risk is the potential for emotional harm. It is impossible to quantify that risk. Dr W's evidence is that if the placement with father can be brought about then, based upon his experience, it is likely that S will quickly settle into his father's care. If that happens, the trauma of the handover will likely prove to be short term. If S is unable to re-establish his relationship with his father quickly, or, worse still, if he is not able to do so at all, then the trauma of a forced handover could have more lasting consequences.

125. I noted earlier the submission made by Miss Meyer based on Article 5. This is not the place for a learned discourse on the interpretation of Article 5. I only have Miss Meyer's written submissions on that point. It is a point not taken either by the guardian or by the local authority. It is, though, appropriate to make the point, though not acknowledged in Miss Meyer's submissions, that S also has rights under Art 8 and it is those rights that lie at the heart of the order I made on 4th January.

126. The reality is that the court has already made the determination that the only way of restoring S's relationship with his father and of overcoming the damage caused by his alienation is by him moving to live with his father. That decision has been upheld by the Court of Appeal. It is important not to lose sight of this. What we are now concerned with is making that order happen.

127. The preferable solution, plainly, would be for the mother herself to take S down to the father's home. If that cannot happen then the only alternatives are placement in foster care under an interim care order or enforced transfer by means of the Tipstaff. I have already expressed my dissatisfaction with the interim care plan. I am satisfied that it is seriously deficient. I have acknowledged that I could adjourn the hearing today to enable the local authority to reflect on this judgment and reconsider its care plan. I have decided not to do so. It is now six weeks since the Court of Appeal upheld my order of 4th January. Today is the eighth time the case

has been before me since then. The agony of uncertainty for S must be unbearable. To delay a final decision any longer would, I am satisfied, be contrary to his best interests. Although I accept that there are risks involved in an enforced transfer, those risks have to be weighed against the potential for longer term gains. Although Mr Vater sought to persuade Dr W that the decision is finely balanced, having reflected carefully on the evidence and submissions, I do not accept that that is so. I agree with Dr W that the time has come to grasp the nettle.

Conclusions

128. This Friday it is S's 12th birthday. He should be allowed to have his birthday with his mother. The transfer of care must be deferred until next week. However, the time has come when this period of uncertainty must be brought to an end. The transfer of care must take place by Friday 12th March. Enquiries must now be made of the Tipstaff and Dr W to see whether there is a day next week that is mutually convenient. If Dr W is unavailable then it may be that the handover has to take place without him. However, on the assumption that there is a day next week that is convenient to the Tipstaff, my order will give the mother one final chance to make the transfer of residence happen without the trauma of an enforced handover. The order will provide that the day preceding the day that is convenient to the Tipstaff the mother shall deliver S to the father at his home at 2.00p.m., and in default there shall be a Collection Order empowering the Tipstaff to collect S the following day at 11.00a.m. The Tipstaff has suggested that he should collect S from his home. Miss Ball has suggested that collection should be from school or from the court. Mr Vater says that the school does not agree to collection taking place from school. I do not consider collection from school to be appropriate given the possibility of resistance by S and the likelihood of onlookers. As between home and court, I will hear further submissions.

129. I do not consider it appropriate for S to be given advance notice of the Tipstaff's visit. Given that in her closing submissions Miss Meyer talks about returning to the

Court of Appeal, it is clear that for the moment nothing should be said to S. I therefore propose to make a prohibited steps order prohibiting the mother from telling S about the attendance of the Tipstaff in advance of his arrival. I will hear submissions on the precise wording of this order.

130. There will be the following ancillary directions:

i Upon the handover being completed, the mother shall have contact by telephone alternate days for ten minutes, that contact to take place by landline and to be monitored by the father.

ii The case shall be listed before me for review on Thursday 25th March at 10.15 with a time estimate of one hour. Until that hearing the mother shall have no direct contact with S.

iii By 4.00p.m. on 23rd March the father shall file a statement outlining how S has settled, what problems have been encountered and what arrangements have been made for his schooling.

iv By 4.00pm on 24th March position statements shall be filed by the parents and the guardian as to future contact arrangements.

v If possible, the guardian shall visit S at his father's home during the week beginning 22nd March and before the hearing on 25th March.

vi By 4pm on 10th March the father shall send to the mother a list of the schools he proposes be considered for S together with the prospectus for each school and a copy of the most recent Ofsted inspection report.

vii At the hearing on 25th March the parents shall produce evidence that they have engaged in constructive dialogue concerning choice of school, whether that dialogue be direct between themselves or between solicitors.

viii The local authority's application for an interim care order will be adjourned until 25th March. I do not yet consider it appropriate to consolidate the two sets of proceedings.

I will hear argument on any further directions that it may be considered appropriate for me to make today.

Publicity

131. On 5th January, upon granting the mother's application for a stay, Lady Justice Smith also made an order in the usual form that

> 'no one shall publish or reveal the name or address of the child who is the subject of these proceedings or publish or reveal any particular or particulars or other information that would be likely to lead to the identification of the child.'

On 21st January the Court of Appeal continued that prohibition.

132. On the afternoon of 21st January, just a few hours after the Court of Appeal had given judgment, a reporter from the Mail on Sunday, Mr Jonathan Petre, attended at the father's home. The father very properly refused to discuss the case with him and immediately notified his legal team. Very late that evening an application was made to the out-of-hours judge, Mrs Justice Macur, for an injunction against the media. Her Ladyship directed that the application should be made in the Applications Court the following morning.

133. On Friday 22nd January Macur J. granted an injunction against the media in all its forms, prohibiting the publication or broadcasting of any information which might be likely to lead to the identification of S. Notwithstanding that injunction, on Sunday 24th January a half page article appeared in the Mail on Sunday under the headline 'Judge orders boy, 11, to live with father he hates and hasn't seen for four years'. A similar article appeared in the Daily Mail on 25th January and in the Daily Telegraph on 26th January.

134. As I noted earlier, the case was back in my list on 26th January. That same day reporters from the Daily Telegraph visited the father's home and spoke to his parents and also visited the mother's home and, there being no-one there, posted a business card through her letter box. The father's solicitors took immediate steps to remind the Daily Telegraph of the reporting restrictions order which had originally

been served on Friday 22nd January.

135. Although media interest has subsided since 26th January, I noted earlier the Tipstaff's concern that, if alerted, the media could have a presence, including photographers, when handover takes place. That, plainly, would not be in S's best interests. I am doubtful that either parent would wish there to be any media presence when handover takes place. However, in this exceptional case, and notwithstanding the fact that the reporting restrictions order is still in force, I propose to take a safety first approach and make a prohibited steps order prohibiting both parents from giving to the media any information at all concerning the handover arrangements. If it is felt that wider protection is needed, I will hear argument on that issue.

His Honour Judge Clifford Bellamy

Designated Family Judge for Warwickshire and Coventry

3rd March 2010